

SUPPLEMENT TO THE DECISION DOCUMENT
FOR NATIONWIDE PERMIT 7

This document is a supplement to the national decision document for Nationwide Permit (NWP) 7, and addresses the regional modifications and conditions for this NWP. The South Pacific Division Engineer has considered the need for additional modifications of this NWP by the establishment of regional conditions. The Division Engineer also considered the exclusion of this NWP from certain geographic areas or specific waterbodies. These regional conditions are necessary to address important regional issues relating to the aquatic environment. These regional issues are identified in this document. These regional conditions are being required to ensure this NWP authorizes activities that result in no more than minimal individual or cumulative adverse effects on the aquatic environment. This document also identifies regionally important high-value waters and other geographic areas in which this NWP should be regionally conditioned or excluded from NWP eligibility as described below, to further ensure that the NWP does not authorize activities that may exceed the minimal adverse effects threshold.

1. Background: On July 1, 1998, the Corps of Engineers (Corps) published its proposal in the Federal Register to issue six new NWPs and modify six existing NWPs to replace NWP 26. The Corps published a supplemental Federal Register notice on October 14, 1998, announcing the withdrawal of one of NWPs and soliciting comments on proposed constraints of the NWPs within the 100-year floodplain, designated critical resource waters, and impaired waters. On March 9, 2000, the Corps published a Federal Register notice containing the final text of the NWPs and general conditions.

The Los Angeles District (LAD) issued public notices on August 3, 1998 and April 21, 2000 to solicit comments on proposed regional conditions for these NWPs. In addition, LAD Regulatory personnel conducted public meetings in Los Angeles and Phoenix on September 9, 1998 and September 30, 1998, respectively. The comments received in response to these public notices and meetings are summarized below.

2. Consideration of Public Comments:

- (a) General Comments: The District received the following general comments on the proposed NWP 7 and associated issues:

(1) In several letters, local flood control agencies indicated the proposed NWPs and associated regional conditions did not consider public safety due to flood events, the additional notification requirements and increased restrictions could result in more than minimal impacts due to flood hazards, and the proposed NWPs and regional conditions would increase the Los Angeles District workload without adding protection to the aquatic environment. Overall, the flood control agencies indicated the proposed changes to the NWP program would increase regulation of projects with de minimis impacts and jeopardize public safety.

Response: With the proposed NWPs and associated regional conditions, flood control projects in areas with relatively low physical and biological functions can proceed without notification to the Corps. However, to ensure minimal impacts to the aquatic ecosystem,

the Corps must place additional restrictions on activities that affect jurisdictional special aquatic sites and sensitive watersheds. With the proposed changes to the NWP program, the Corps has balanced the need for both flood safety and environmental protection. With the proposed regional conditions, there would only be a minor increase in workload, but substantial benefits could result to the aquatic environment. Therefore, the Corps respectfully agrees with the commenter and believes that a proper balance between two important issues is established with the regional conditions.

(2) As part of the proposed regional conditions, several environmental groups indicated regional standards need to be developed for wetland hydrology and hydric soils in southern California. In addition, a commenter indicated there needs to be a standard definition for what constitutes a water of the United States, specifically for ephemeral washes.

Response: The Corps concurs that regional standards for jurisdictional ephemeral streams, wetland hydrology and hydric soils would be a very useful tool for future wetland delineations. However, it would not be appropriate to develop these standards as part of the proposed regional conditions for the NWPs. Furthermore, 33 CFR Part 328 and the final version of the NWPs (FR 65:47 - March 9, 2000) provide a definition for what constitutes a jurisdictional water of the United States, including intermittent and ephemeral streams.

(3) Several environmental groups indicated they supported the proposal to include upland buffers as part of mitigation plans to offset impacts to waters of the United States. They recommended that wetland buffers should be required to retain existing permeable area for high water/runoff flows for a minimum 100-year flood, and maintenance of all existing functions for these areas including: pollution retention, sediment filtration, groundwater recharge, flood and erosion control, and corridors that allow the movement of native animals between the wetland or open water area and nearby upland habitats.

Response: Comment Noted.

(4) A commenter indicated that all discharges of dredged or fill material in wetlands should be precluded under the proposed NWP program. With the amount of historic loss of wetland resources, the commenter indicated that only wetland enhancement and restoration projects should be authorized under the proposed NWPs.

Response: Although most projects authorized under NWP 7 would typically result in only minor temporary and permanent impacts to a small area of waters of the United States during construction and result in only temporary impacts to the previously disturbed area during maintenance, these structures can be readily designed and constructed to avoid most special aquatic sites. In the Los Angeles District, the semi-arid climate limits the amount of special aquatic sites that occur throughout the region. In dryland areas, lack of vegetation and developed soils result in high peak discharges for large storm events. With a predominance of deep alluvial soils, dryland systems are dominated by overland flow with groundwater recharge and throughflow only contributing a small quantity to stream discharge. Over the past fifty years, substantial construction activities have resulted in a loss of approximately 90% of wetlands and 95% of the vernal pools in southern California, as well as a relatively significant amount in Arizona. The above indicates that

further loss of special aquatic sites in southern California and Arizona could result in more than minimal cumulative impacts. To ensure any impact to special aquatic sites is offset by compensatory mitigation, the Los Angeles District would require notification for any project that impacts a special aquatic site.

Certain watersheds or regions in the Los Angeles District include waters of the United States that support high physical and biological functions that are threatened by cumulative impacts at the watershed level. To ensure that NWP 7 would have minimal impacts to these watersheds or regions, the Los Angeles District would require notification for all projects in the Santa Monica Mountains watersheds, all perennial watercourses in the State of Arizona and the Mojave and Sonoran desert regions in California, all areas designated as Essential Fish Habitat and all jurisdictional special aquatic sites. A regional condition for the final NWPs that precludes all discharges of fill material in wetland areas would unnecessarily increase our workload to review small-scale impacts in areas that do not exhibit the same level of cumulative impacts or sensitivity. As a result, elimination of NWP 7 in all wetland areas would not be practicable in light of the District's workload and would have only minor environmental benefits to waters of the United States at the regional level. The Los Angeles District believes that with the inclusion of the above modifications, the Los Angeles District would ensure minimal impacts for NWP 7, both individually and cumulatively, without a substantial increase in our overall workload.

(5) Several commenters indicated that the proposed NWPs would result in more than minimal cumulative impacts in the Santa Margarita River watershed in Riverside and San Diego counties. As evidence for the cumulative impacts, they referenced Dr. Eric Stein's study of the impact of the Section 404 Permit Program on the above watershed.

Response: The Los Angeles District recognizes both the level of impacts to the Santa Margarita River watershed and the evidence provided by Dr. Stein in his research. In response to the above, the District proposes to take discretionary authority over NWPs 39, 42 and 43 that authorize new fills in perennial and intermittent watercourses in the Murrieta Creek and Temecula Creek watersheds. In addition, this discretionary authority is extended to jurisdictional ephemeral watercourses in these watersheds if the project impacts more than 0.1 acre of the ephemeral drainage. By taking discretionary authority in these two watersheds that exhibit cumulative impacts from past Section 404 permit actions, or other unauthorized activities, the Los Angeles District will ensure mitigation of future impacts, full compliance with the ESA, and protection of special aquatic sites. A regional condition for the proposed nationwide permits that precluded all discharges of fill material in the entire Santa Margarita River watershed would unnecessarily increase our workload to review small-scale impacts in portions of the watershed that do not exhibit the same level of cumulative impacts. This preclusion would also unnecessarily overburden the regulated community with Standard Individual Permit review in every case. As a result, elimination of all NWPs, including NWP 7, in the Santa Margarita River watershed would not be justifiable in light of the District's workload, the burden to the regulated public, and the minor environmental benefits to waters of the U.S. in the Santa Margarita River watershed.

(6) Several commenters opposed establishment of regional conditions for the replacement nationwide permits issued in the March 9, 2000 Federal Register notice (65 FR 12818)

and requested that they be withdrawn from further consideration. Several commenters requested that a public hearing be held to allow them to personally voice their opposition. Several commenters requested that Los Angeles District extend the comment period for the April 21, 2000 public notice by at least two weeks. Several commenters requested that prior to any public hearing on the regional conditions, the Corps should provide written responses to the comments received during the written comment period. Several commenters indicated that regional conditions on the nationwide permits would be unnecessarily complex and would duplicate other existing regulatory programs, such as the reviews conducted by the U.S. Fish and Wildlife Service (USFWS), the National Marine Fisheries Service (NMFS), the State Water Resources Control Board (SWRCB) and its member Regional Water Quality Control Boards (RWQCB), the Arizona Department of Environmental Quality (ADEQ) in Arizona, the California Coastal Commission (CCC), and the State Historic Preservation Offices (SHPO). This commenter requested that findings of these agencies' reviews of the nationwide permit program in the District be addressed in a separate public notice and circulated for public comment.

Response: General permits, such as the NWPs and regional general permits established by the District or Division Engineer, can only be established if in conformance with Section 404(e). Section 404(e) enables the establishment of general permits only if they are for a relatively specific type of activity and if they have minimal adverse impacts on an individual and cumulative basis. It is unreasonable to presume that any general permit has uniform applicability across the breadth of the United States from Alaska to Florida and from Maine to Hawaii. It is equally unreasonable to presume that any general permit demonstrates the same relative level of impact to aquatic resources across the breadth of the U.S. Hence, the development of regional conditions to address the local conditions that may be affected by the implementation of the general permit.

The Los Angeles District conducted public meetings on September 9 and September 20, 1998 specifically to receive comments on proposed regional conditions. Those comments were given full consideration in subsequent public notices issued after publication of draft NWPs in the Federal Register. Comments provided at the public meetings were essentially oral recitations of the written comments provided for submittal to the record.

The comment period for the April 21, 2000 public notice was extended to allow ample opportunity for the provision of comments. However, an extension was given to all who requested it, and comments received after the close of the comment period were also accepted and are part of the public record. Responses to written comments received were not prepared and distributed to the commenters. Responses to comments are provided in this document as part of the Corps' environmental assessment of the potential effect on the human environment of the NWPs and associated regional conditions. This is the appropriate avenue to follow under the National Environmental Policy Act (NEPA) and Section 404 of the Clean Water Act (CWA).

On a cursory level, it may appear that the Corps' regulatory responsibilities under Section 404 of the Clean Water Act, Section 10 of the River and Harbor Act approved March 3, 1899, and Section 103 of the Marine Protection, Research and Sanctuaries Act of 1972 are simply duplicating the reviews conducted by other State and Federal agencies. However, each agency has specific responsibilities as directed by State or Federal statute, which cannot be delegated to another agency without considerable development of procedures,

which may also require additional rulemaking and/or modifications of statutes. For instance, under Section 404 of the CWA, the Corps of Engineers was given the responsibility to regulate the discharge of dredged or fill material into waters of the U.S. by Congress. This responsibility cannot be easily delegated to another agency without their agreement and substantial additional development of procedures, not to mention funding of programs and liability issues. For these reasons, each agency is better equipped to address its responsibilities for issues related to aquatic resources at this time. We also disagree with the statement that the various agencies' responsibilities are duplicated unnecessarily. The USFWS and NMFS oversee coastal and inland wildlife resource issues; the SWRCB, ADEQ and RWQCBs address state water quality issues as directed under Section 401 of the CWA; the CCC addresses compliance with the Coastal Zone Management Act, and the SHPO addresses potential effects of a federal action on cultural resources as directed by the National Historic Preservation Act. The Corps, as a federal action agency, must comply with all applicable federal, state and local statutes. To ensure such compliance, the Corps coordinates with these agencies and others. Just as the other agencies have no authority to regulate discharge of dredged or fill material, neither does the Corps have the authority to make absolutely unilateral decisions regarding issues pertaining to fish and wildlife issues, coastal zone resources, water quality compliance determinations, or mitigation for impacts to cultural resources. If duplication of effort is perceived, it is simply perception and not substance. The Corps will not issue an additional public notice to simply state the findings of other agencies' reviews of the NWP program. Their comments pertaining to the issuance of the new and modified NWPs and the District's regional conditions are summarized in this document, and are followed by the District's response.

(7) One commenter stated the District couldn't establish regional conditions by public notice because such conditions must be adopted in conformance with the Administrative Procedures Act (APA). This commenter noted that public notices consist of sending information to those on the District's mailing lists or posting such notices on the District's webpage. This commenter stated that such notices do not comply with the federal requirements for adopting rules under the APA. This commenter stated the public notices issued to date do not adequately explain why the Corps decided to impose additional requirements beyond those in the proposed NWP. This commenter stated there are no compelling reasons to add regional conditions to the NWPs and that they would create unnecessary work and delay.

Response: Without greater specificity as to areas of discrepancy with the APA, the District must respectfully disagree with the commenter. In simple terms, the APA provides for, among other things, a means by which a federal agency proposing an action that may affect the public at large, issue notice of such action well in advance, to receive comment on the proposed action, make documents readily available for review by requesting parties, and document any final decisions made. The Corps issued several notices in the Federal Register as noted above. These notices specifically mentioned the development of regional conditions by each District to ensure the new and modified NWPs have minimal impacts as required the Section 404(e) of the CWA. The District followed this direction utilizing procedures already established in the implementing regulations for the Regulatory Program and issued three public notices of proposed

regional conditions in response to each of three Federal Register notices on proposed and final new and modified NWP. The District received comments on each notice that were then accepted into the public record. Full consideration was given to all comments received, written, oral, electronic or otherwise. With each iteration of the Federal Register notices and the District's subsequent public notices, the District made new assessments as to the need for regional conditions to limit the extent of the NWP, and to address sensitive resources, habitat types, or waters

(b) Comments on Proposed Regional Conditions:

(1) Comments on proposed Regional Condition 1:

Regional Condition 1 would require bridge crossings over streams that support steelhead migration, spawning, or rearing to be constructed in a manner that avoids adverse impacts to these activities. Such construction could be in the form of a span crossing or buried culverts such that passage by steelhead is unimpeded. Several commenters indicated the regional condition would unnecessarily increase the District's workload with only minor benefits to the aquatic ecosystem. One commenter objected to the inclusion of bridge crossing design parameters to address passage of steelhead (*Oncorhynchus mykiss*), listed as threatened under the Federal Endangered Species Act. This commenter stated that wholesale inclusion of "all road crossings" is arbitrary and capricious; that no data exists to justify the mandate for one type of crossing over another, and that there is no explanation of the geographic boundaries included. This commenter stated that concern for a given species is a separate consideration from those at issue under the CWA: the issue of discharge of dredge or fill material. This commenter noted that existing general conditions, most notably general condition 11, already address potential effects on listed species or their designated critical habitat, and concluded that any further conditioning to address listed species or critical habitat is duplicative and unnecessary. This commenter recommended deleting the proposed regional condition from further consideration. Several commenters, including NMFS and USFWS, indicated they supported the proposed condition and suggested additional areas that should be included in the condition.

Response: The Los Angeles District disagrees with the commenter's statements. Because bridge crossings typically result in a discharge of dredged or fill material into waters of the U.S., the Corps has a responsibility to assess the proposed action's effect on aquatic resources, including listed species such as southern steelhead. If the Corps determines a proposed action may affect a listed species or its critical habitat, or a species or area proposed for listing or designation, it must consult with the USFWS or NMFS pursuant to Section 7 of the Endangered Species Act (ESA). This is a statutory requirement. Consultation pursuant to the ESA must weigh the potential detriment of the federal action (such as issuance of a Department of the Army permit) on the listed species or critical habitat. Such consultations typically result in a biological opinion rendered by USFWS or NMFS. If the Service determines the proposed action would not likely jeopardize a listed species, they would typically include an incidental take statement, often with associated non-discretionary terms and conditions to minimize take of the listed species. "Take" of a listed species is identified as the harassment, harm, pursuit, hunting, shooting, wounding, killing, trapping, capturing, or collecting of the species, or the attempt to engage in any such conduct. Interference with the normal life processes of the listed species, such as reproduction and including migration, could be construed as harm, and as such, would likely be addressed in the opinion.

Terms and conditions would address bridge-crossing design to minimize interference of migration of adult and juvenile steelhead. In addition, the Corps must determine if a proposed project would adversely affect designated critical habitat. If a proposed bridge design would likely result in a blockage of steelhead migration, it would be determined to be an adverse effect and consultation would be required. Consultations usually take several months to complete to arrive at a conclusion that the bridge design will have to accommodate steelhead passage. Furthermore, general condition 4 states “[n]o activity may substantially disrupt the movement of those species of aquatic life indigenous to the waterbody, including those species which normally migrate through the area...” Therefore, the District’s decision to require a bridge crossing on a known steelhead stream to accommodate steelhead is not arbitrary and capricious, but rather demonstrates recognition of the inevitable. Regarding the lack of data mandating one road crossing design over another, it would seem evident that some crossing designs, although adequate for transportation needs, would result in an obstacle for aquatic species that must migrate upstream to fulfill one or more life stages. Steelhead must be able to traverse the streamcourse to successfully arrive at an appropriate spawning area. If minimization of obstacles is possible for any project, this minimization should be taken and is called for in the Regulatory Program. The simple provision of a culvert is often deficient and the regional condition seeks to avoid unnecessary delay of projects that arises out of unacceptable project design. Regarding discussion of geographic boundaries where the regional condition would apply, it should appear evident by the condition’s wording. Simply stated, the condition would apply in all coastal watercourses that have potential for supporting one or more life stages of steelhead from the Santa Monica Mountains to the District boundary at the San Luis Obispo/Monterey county line. This condition was delimited as it was because the Santa Monica Mountains have known steelhead populations in a minimum of two watersheds (Malibu Creek and Arroyo Sequit) and the species has been observed in many of the watersheds to the north. The only other known population south of the Santa Monica Mountains is San Mateo Creek at the Orange/San Diego county boundary on Marine Corps Base, Camp Pendleton. This creek is not included in this regional condition because it is not anticipated the Base will require a bridge crossing over San Mateo Creek in the near future. If it does, they would be responsible for consultation with the NMFS for steelhead issues in addition to applying for a Department of the Army permit for the crossing in waters of the U.S. The commenter is correct that the Corps’ Regulatory responsibility under Section 404 of the CWA is the regulation of dredged or fill material into waters of the U.S. However, as noted in the first paragraph of this response, that responsibility also requires compliance with all applicable statutes and regulations. The District firmly believes informing the regulated public of the requirement to design a bridge crossing in a steelhead creek to allow for the continued use of the creek by steelhead is a logical and appropriate response to its responsibilities under the CWA and ESA. Submittal of initial designs that demonstrate such compliance would save time and effort on the part of the applicant, the Corps and the NMFS. Bridge crossing designs on watercourses that support migration, spawning or rearing of southern steelhead should be designed to not impede such migration, spawning or rearing. Because projects that discharge fill material into such waters would need a permit from the Corps pursuant to Section 404 of the Clean Water Act, the Corps would have to determine whether such a discharge may affect the species or its designated critical habitat. If the Corps determines the project may affect the species or its habitat, it is obligated to consult with NMFS pursuant to Section 7 of the Endangered Species Act. This consultation would likely result in recommendations to address impediments to steelhead migration, spawning or rearing. Furthermore, general condition 4 states no activity may substantially disrupt movement of species

indigenous to the waterbody, including migration, and that culverts must be installed to maintain low flow conditions. While some may think the regional condition is redundant, Los Angeles District believes this condition will greatly benefit the species while allowing the applicant a high degree of assurance his proposed project would meet minimal further constraints in most cases by better focusing the applicant's design efforts to a project more likely to achieve agency approvals. Los Angeles District also believes this condition would place virtually no additional workload on the District and is more likely to lessen workload for such projects due to design meeting desirable parameters prior to submittal.

(2) Comments on Proposed Regional Condition 2:

Several commenters indicated that the geographic description for the desert areas of California was vague and confusing. One commenter stated the District would arbitrarily and capriciously eliminate availability of NWP's to broad geographic areas without explanation or data why these areas should be subject to different treatment than the rest of the region. This commenter stated the public notice did not address why some NWP's are acceptable while others are not, and recommended deleting the proposed regional condition from further consideration. In addition, several commenters indicated that small projects in desert areas that include impacts to special aquatic sites could still meet the minimal impacts test. As a result, they believed that this condition was unnecessarily restrictive. In addition, several commenters questioned the scientific basis for singling out special aquatic sites in desert areas for additional restrictions. Other commenters indicated that this regional condition should be expanded to include all special aquatic sites in the Los Angeles District.

Response: For the majority of projects in the desert regions of California, it will be quite clear from the geographic description whether the regional condition applies. Initially, there may be some confusion along the margins of the above desert regions; however, the prospective applicant can contact the Los Angeles District to clarify the issue. When the regional conditions are established, the Los Angeles District should be able to provide maps that clearly indicate the geographic boundaries of the desert areas.

This regional condition provides needed restrictions for discharges of dredged or fill material associated with new structures or facilities in special aquatic sites in desert regions. Special aquatic sites in the desert regions of the Los Angeles District support substantial aquatic resources that exhibit relatively high physical and biological functions. These aquatic areas provide important and unique habitat for both threatened and endangered species, including least Bell's vireo and southwestern willow flycatcher, Neotropical migratory birds and other indigenous wildlife. In addition, past construction activities in and adjacent to these special aquatic sites have degraded portions of these high value systems.

To ensure the proposed NWP's would have minimal impacts, both individually and cumulatively, new permanent fills in special aquatic sites in the above desert regions should be precluded in the Los Angeles District. By eliminating new permanent fills in special aquatic sites in the desert, any further losses of this valuable desert resource would be reviewed under the Individual Permit process that requires a rigorous alternatives analysis. As a result, further impacts to the special aquatic sites in the desert would be avoided and minimized to the maximum extent practicable. With this regional condition, the Los Angeles District can ensure the proposed NWP's would have minimal impacts, both individually and cumulatively, to special aquatic sites in the desert regions of the Los Angeles District.

An alternative regional condition would prohibit the use of NWP's in all special aquatic sites in the Los Angeles District. The loss of approximately 90% of wetland resources in southern California and the general scarcity of special aquatic sites in this semi-arid region indicates there could be a need for the review of any project which would discharge dredged or fill material in a special aquatic site under the 404(b)(1) Guidelines and the public interest factors to ensure no adverse impacts to special aquatic sites. However, as discussed above, the proposed NWP's would only impact a maximum of 0.5 acre of waters of the United States. With the inclusion of all the restrictions on NWP's (General Conditions and the terms and conditions), a regional condition that precluded all discharges in special aquatic sites would unnecessarily increase our workload to review small-scale impacts in areas that exhibit lower physical and biological functions, or where such resources occur more frequently or have relatively lesser importance to organisms. As a result, precluding all discharges in special aquatic sites in the District would not be practicable and would result in relatively minor environmental benefits to the aquatic ecosystem at the expense of an unmanageable workload.

The District disagrees that it was arbitrary and capricious when it developed its regional conditions. In response to three Federal Register notices on proposed new and modified replacement NWP's, the District issued three public notices on proposed regional conditions intended to limit potential impacts to aquatic resources within the District. In each case, the District considered anew the constraints inherent to each NWP and how it may affect resources within the District, the level of impacts already experienced by such resources within the District, and discussed matters pertaining to proposed limitations with Regulatory staff and resource agencies. Following analysis of comments received and additional internal and external discussions, the District further modified its proposals. The regional conditions developed following the third public notice of April 21, 2000 reflect a continual modification process to determine what is still appropriate based upon the District's review of the new and modified NWP's, existing unmodified NWP's, and other general permits, the resource values of the aquatic resources within the District, potential impacts to these values, and cumulative impacts to these resources over time and into the reasonably foreseeable future. If a particular aquatic resource is limited and demonstrates high values for any of a number of reasons, it is appropriate to protect those remaining high values.

(3) Comments on Proposed Regional Condition 3:

Several commenters indicated they supported this regional condition and indicated that, by requiring color photographs as part of the application, it could provide better information to decision makers and speed up the permit process. Several commenters requested that condition be modified to include color photographs from specific reference points that are documented on a map. However, other commenters indicated this regional condition placed an unnecessary burden on applicants and that color photographs should only be required when sensitive resources are present in the project area. Overall, these commenters believed this regional condition would unnecessarily increase the cost of an application without any real benefits to decision makers.

Response: The Los Angeles District firmly believes color photographs can provide valuable information on the level of existing physical and biological functions present in a given project area. In some cases, the photographs will verify that no sensitive habitat is present, decreasing the number of site visits by Regulatory Branch staff. We believe this condition will increase our

efficiency by allowing desk assessments of affected habitat, speeding up the permit process for small projects that do not impact sensitive resources. This regional condition would be a valuable tool for the Regulatory Program and we have incorporated the suggested requirement of specific reference points that are indicated on an attached map.

(4) Comments on Proposed Regional Condition 5:

Comments on proposed Regional Conditions to require notification for projects in special aquatic sites, essential fish habitat and Santa Monica Mountains watersheds (Regional Conditions 5a-5d). Several commenters indicated the geographic description for the Santa Monica Mountains area was vague and confusing. Several commenters indicated that small projects in desert areas that include impacts to special aquatic sites could still meet the minimal impacts test. As a result, they believed the notification requirements were unnecessarily restrictive.

Response: For the majority of projects in the Santa Monica Mountains, it will be quite clear from the geographic description whether the regional condition applies. Initially, there may be some confusion along the margins of the above area; however, the prospective applicant can contact the Los Angeles District to clarify the issue. When the regional condition is established, the Los Angeles District should be able to provide maps that clearly indicate the geographic boundaries of the Santa Monica Mountains area.

It is the position of the Los Angeles District that any discharge of dredged or fill material in a special aquatic site warrants the review of Regulatory Branch. The loss of approximately 90 percent of wetland resources in southern California and the general scarcity of special aquatic sites in this semi-arid region indicates the need for compensatory mitigation to ensure minimal adverse impacts to special aquatic sites. With this notification requirement, the Los Angeles District can ensure the proposed NWP would have minimal impacts, both individually and cumulatively, to special aquatic sites.

Jurisdictional waters of the United States in the Santa Monica Mountains watersheds support substantial aquatic resources that exhibit relatively high physical and biological functions. Furthermore, a number of endangered species, including the southern steelhead, tidewater goby, utilize habitat in these watersheds. In addition, past construction activities in and adjacent to waters of the United States in these watersheds have degraded portions of these high value systems. To ensure the proposed NWP would have minimal impacts, both individually and cumulatively, we believe Regulatory Branch should review every project. With this notification requirement, further losses in this area would be compensated with mitigation and further impacts to the aquatic ecosystem would be minimized. With this notification requirement, the Los Angeles District can ensure the proposed NWP would have minimal impacts, both individually and cumulatively, to aquatic resources in the Santa Monica Mountains watersheds.

Perennial watercourses or water bodies in the desert regions of the Los Angeles District support substantial aquatic resources that exhibit relatively high physical and biological functions. These perennial watercourses or waterbodies provide important and unique habitat for threatened and endangered species, including the least Bell's vireo and southwestern willow flycatcher, Neotropical migratory birds, and other indigenous wildlife. In addition, past construction activities in and adjacent to these perennial watercourses have degraded portions of these high value systems. To ensure the proposed NWP would have minimal impacts, both individually and cumulatively, Regulatory Branch should review every project. With this notification requirement, further losses of this valuable desert resource would be compensated with mitigation and further

impacts to the aquatic ecosystem would be minimized. With this notification requirement, the Los Angeles District can ensure the proposed NWP would have minimal impacts, both individually and cumulatively, to perennial watercourses and water bodies in the desert regions of the Los Angeles District.

The jurisdictional waters of the United States in tidal areas support substantial aquatic resources that exhibit relatively high physical and biological functions. A number of threatened or endangered species, including the California least tern, California brown pelican, western snowy plover and tidewater goby, utilize habitat in these areas. In addition, past construction activities in and adjacent to waters of the United States have degraded portions of these high value coastal systems.

To ensure the proposed NWP would have minimal impacts to Essential Fish Habitat, both individually and cumulatively, Regulatory Branch should review every project. With this notification requirement, further losses in these coastal areas would be compensated with mitigation and further impacts to the marine ecosystem would be minimized. With this notification requirement, the Los Angeles District can ensure the proposed NWP would have minimal impacts, both individually and cumulatively, to aquatic resources in tidal areas within the Los Angeles District.

(5) Comments on Proposed Regional Condition 6:

The Los Angeles District proposed taking discretionary authority in several areas of the District to protect sensitive aquatic habitat types or watersheds. Several commenters indicated the proposed constraints on vernal pools were unnecessary considering other conservation measures in place to address this sensitive resource, or were too restrictive considering the small acreage involved with many projects that may affect vernal pools. Several commenters also questioned whether vernal pools could be adequately described considering the unique characteristics inherent to each pool. Several commenters noted the extreme loss experienced by this resource in southern California would warrant their exclusion from consideration of authorization by any general permit. The resource agencies and environmental community noted how the Santa Margarita River watershed has received a significant level of adverse impact to the various watersheds, leading to a variety of problems such as increased runoff and erosion, incision of channels, deposition of sediment leading to adverse flooding situations, etc. Conversely, several commenters noted the proposed restriction is not necessary and would adversely affect the Corps' workload and subsequent response time.

Response: Loss of vernal pool habitat in the Los Angeles District is well documented, and ranges from 95 to more than 99 percent in the southern California region indicating substantial cumulative losses of this habitat type in these areas. Vernal pools not only represent a unique type of wetland habitat, but also provide essential habitat for several endangered invertebrate and plant species. It is the position of the Los Angeles District that vernal pools in the above areas are sufficiently rare that the loss of or impact to any jurisdictional vernal pool should be significantly mitigated and/or require site specific review under the Section 404(b)(1) Guidelines and public interest review factors to fairly evaluate the impacts of the proposed activity on the physical and biological functions of the aquatic ecosystem. Without the above exclusion, the NWP would result in more than minimal impacts to special aquatic sites and endangered species in the Los Angeles District.

This regional condition provides needed restrictions for discharges of dredged or fill

material associated with new structures or facilities in special aquatic sites in desert regions. Special aquatic sites in the desert regions of the Los Angeles District support substantial aquatic resources that exhibit relatively high physical and biological functions. Furthermore, these aquatic areas provide important and unique habitat for both endangered and threatened species, including least Bell's vireo and southwestern willow flycatcher, Neotropical migratory birds and other indigenous wildlife. In addition, past construction activities in and adjacent to these special aquatic sites have degraded portions of these high value systems. To ensure the proposed NWP would have minimal impacts, both individually and cumulatively, new permanent fills in special aquatic sites in the above desert regions should be precluded by the Los Angeles District. By eliminating authorization by general permit of new permanent fills in special aquatic sites in the desert, any further losses of this valuable desert resource would be reviewed under the Individual Permit process that requires a rigorous alternatives analysis. As a result, further impacts to special aquatic sites in the desert would be avoided and minimized to the maximum extent practicable. With this regional condition, the Los Angeles District can ensure the proposed NWP would have minimal impacts, both individually and cumulatively, to special aquatic sites in the desert regions of the Los Angeles District.

Based on a cumulative impact assessment for the Santa Margarita River watershed by Dr. Eric Stein, the Murrieta Creek and Temecula Creek watersheds have been affected by a large number of past Section 404 permit actions. In addition, portions of these watersheds support riparian areas that exhibit relatively high physical and biological functions. As a result, further permanent fills in waters of the United States under the NWP program could result in greater than minimal cumulative impacts to jurisdictional areas for certain types of projects in these two watersheds. By precluding authorization under NWPs 39, 42, and 43 for new permanent fills in perennial and intermittent watercourses in these two watersheds that exhibit cumulative impacts from past Section 404 permit actions, and for projects that cause the loss of more than 0.1 acres of ephemeral watercourses in these same watersheds, the Los Angeles District will ensure mitigation of future impacts, full compliance with the ESA and protection of special aquatic sites. A suggested regional condition for the NWPs which precluded all discharges in the entire Santa Margarita River watershed would unnecessarily increase our workload to review small-scale projects in areas of the watershed that do not have substantial cumulative impacts at this time. As a result, the District's regional condition would be practicable in light of its workload and would result in substantial environmental benefits to the aquatic ecosystem.

In Gaviota Creek, Mission Creek, and Carpinteria Creek of Santa Barbara County, and San Luis Obispo Creek and Santa Rosa Creek of San Luis Obispo County, a substantial number of bank stabilization projects have resulted in cumulative adverse impacts to flow velocity and water surface elevations during storm events. With the augmented flow velocity, channel substrate can be scoured during large storm events causing loss of vegetation and long-term channel incision. Although the bank stabilization projects have not resulted in the loss of a large amount of waters of the U.S., the cumulative hydrogeomorphic effects of the bank stabilization have eliminated habitat for the threatened southern steelhead that utilizes these streams. At present, there have been cumulative impacts to the above species directly resulting from the use of NWPs 14 and 26 in these stream channels. By taking discretionary authority over new bank stabilization projects in these two stream channels that exhibit cumulative impacts from past Section 404 permit actions, the Los Angeles District will ensure mitigation of future impacts, full compliance with the ESA and protection of special aquatic sites. A suggested regional condition for the NWPs that precluded all bank stabilization projects in the entire watersheds for the above creeks would

unnecessarily increase our workload to review small-scale projects in areas of the watersheds that do not have substantial cumulative impacts from bank stabilization at this time. As a result, the District's proposed regional condition would be practicable in light of its workload and would result in substantial environmental benefits to the aquatic ecosystem.

3. Consideration of Available Data:

The Los Angeles District has verified approximately 130 authorizations under NWP 7, with an average of approximately 14 projects annually. Temporary impacts generally result from construction-related activities, such as cut and fill, stockpiling of fill material, and staging and storage areas for equipment and materials. Permanent impacts typically encompass the footprint of the outfall and intake structures and any associated grade stabilizers, such as rock rip-rap or wing deflectors. Individually and cumulatively, permanent impacts resulting from construction of outfall structures are minimal and likely impact far less than two acres per year in total. Temporary impacts are slightly greater, but the impacts are typically short-term and minor.

The Los Angeles District anticipates that many projects that were previously constructed under NWP 26 and were non-notifying may now seek NWP 7 to authorize installation and maintenance of an outfall structure. Review of projects previously authorized under NWP 26 indicates that approximately five additional projects per year could be authorized under the proposed NWP 7. In general, these projects occurred in small ephemeral and intermittent drainages or in tidally influenced areas. In addition, these projects typically affected less than one acre of waters of the United States with limited permanent impacts to the aquatic ecosystem. Overall, the review of the existing data indicates the proposed NWP 7 would continue to affect only a small amount of waters of the United States with most authorized work only resulting in minor temporary impacts to the aquatic ecosystem.

4. Waters Excluded from NWP or Subject to Additional Notification Requirements:

- (a) The Corps has identified waters that will be excluded from use of this NWP. An explanation accompanies each waterbody. These waters are:

- (1) All jurisdictional vernal pools.

Reason for Exclusion: Substantial loss of jurisdictional vernal pool habitat has been documented in the southern California region. Loss of vernal pools ranges from 95 to more than 99 percent in the coastal counties from Santa Maria southward to Baja California and the western Riverside County area, clearly indicating substantial cumulative losses of this habitat type in these areas. In the Los Angeles Basin area, losses are almost total. Jurisdictional vernal pools are unique wetland habitat types, and provide essential habitat for several threatened or endangered invertebrate and plant species endemic to a limited number of pools. It is the position of the Los Angeles District that vernal pools in the above areas are sufficiently rare that the loss of or impact to any jurisdictional vernal pool should be significantly mitigated and/or require site specific review under the Section 404(b)(1) Guidelines and public interest review factors to fairly evaluate the impacts of the proposed activity on the physical and biological functions of the aquatic ecosystem. Without the above exclusion, NWP 43 would result in more than minimal impacts to special aquatic sites and threatened or endangered species in the Los

Angeles District.

(2) For the State of Arizona and the Mojave and Sonoran (Colorado) desert regions of California in the Los Angeles District (generally north and east of the San Gabriel, San Bernardino, San Jacinto and Santa Rosa mountain ranges, and south of Little Lake, Inyo County), no nationwide permit, except Nationwide Permits 1 (aids to navigation), 2 (Structures in Artificial Canals), 3 (Maintenance), 4 (Fish and Wildlife Harvesting), 5 (Scientific Measurement Devices), 6 (Survey Activities), 9 (Structures in Fleeting and Anchorage Areas), 10 (Mooring Buoys), 11 (Temporary Recreational Structures), 20 (Oil Spill Cleanup), 22 (Removal of Vessels), 27 (Stream and Wetland Restoration Activities), 30 (Moist Soil Management for Wildlife), 31 (Maintenance of Existing Flood Control Projects), 32 (Completed Enforcement Actions), 35 (Maintenance Dredging of Existing Basins), 37 (Emergency Watershed Protection and Rehabilitation), and 38 (Cleanup of Hazardous and Toxic Waste), or other nationwide or regional general permits that specifically authorize maintenance of previously authorized structures or fill, can be used to authorize the discharge of dredged or fill material into a jurisdictional special aquatic site as defined at (40 CFR Part 230.40-45 (sanctuaries and refuges, wetlands, mud flats, vegetated shallows, coral reefs and riffle-and-pool complexes).

Reason for Exclusion: This regional condition provides needed restrictions for discharges of dredged or fill material associated with new structures in special aquatic sites in desert regions. Special aquatic sites in the desert regions of the Los Angeles District support substantial aquatic resources that exhibit relatively high physical and biological functions.

These aquatic areas provide important and unique habitat for both threatened and endangered species, including least Bell's vireo and southwestern willow flycatcher, Neotropical migratory birds and other indigenous wildlife. Past construction activities in and adjacent to these special aquatic sites have degraded portions of these high value systems. To ensure the NWP's would have minimal impacts, both individually and cumulatively, authorization by general permit for new permanent fills in special aquatic sites in the above desert regions should be precluded in the Los Angeles District. Proposals for further impacts to this valuable desert resource would be reviewed under the Individual Permit process that requires a rigorous alternatives analysis. As a result, further impacts to the special aquatic sites in the desert would be avoided and minimized to the maximum extent practicable. With this regional condition, the Los Angeles District can ensure the NWP's would have minimal impacts, both individually and cumulatively, to special aquatic sites in the desert regions of the Los Angeles District.

(3) Restrictions on the use of NWP's 39, 42, and 43 in perennial and intermittent watercourses, and in ephemeral watercourses if the project impacts more than 0.1 acres of such waters, in the Murrieta Creek and Temecula Creek watersheds in Riverside County for new permanent fills.

Reason for Exclusion: According to a cumulative impact assessment for the Santa Margarita River watershed by Dr. Eric Stein, the Murrieta Creek and Temecula Creek watersheds have been affected by a large number of past Section 404 permit actions, as well as additional unauthorized fills. In addition, portions of these watersheds support riparian areas that exhibit relatively high physical and biological functions. Further permanent fills in waters of the United States under certain NWP's would likely result in

greater than minimal impacts to jurisdictional areas in these two watersheds on a cumulative basis. By taking discretionary authority over such actions in these two watersheds that exhibit cumulative impacts from past 404 permit actions, the Los Angeles District will ensure mitigation for future impacts, full compliance with the Endangered Species Act, and protection of special aquatic sites.

A proposed regional condition for the NWP that precluded all discharges in the entire Santa Margarita River watershed would unnecessarily increase our workload by requiring review of small-scale projects in areas of the watershed that do not have substantial cumulative impacts at this time, or which are not likely to adversely affect the watershed on an individual or cumulative basis. Therefore, this proposed regional condition would not be practicable in light of the District's workload and would not likely result in substantial environmental benefits to the aquatic ecosystem.

(4) San Luis Obispo Creek and Santa Rosa Creek watersheds in San Luis Obispo County for bank stabilization projects.

Reason for Exclusion: In the watersheds of San Luis Obispo Creek and Santa Rosa Creek, bank stabilization projects have resulted in more than minimal cumulative impacts to flow velocity and water surface elevations during storm events. With the augmented flow velocity, large storm events scour the channel substrate causing loss of vegetation and long-term channel incision. Although bank stabilization projects have not resulted large losses of waters of the U.S., the cumulative hydrogeomorphic effects of bank stabilization projects have eliminated habitat for the threatened southern steelhead and other species that utilize these streams. At present, Los Angeles District has identified more than minimal cumulative impacts directly resulting from the use of NWPs 13, 14 and 26 in these stream channels. By taking discretionary authority over new bank stabilization projects in these two stream channels, the Los Angeles District will ensure future impacts are appropriately mitigated.

A proposed regional condition that precludes all discharges in the entire San Luis Obispo Creek and Santa Rosa Creek watersheds would unnecessarily increase our workload to require review of small-scale projects in areas of the watersheds that do not exhibit substantial cumulative impacts at this time, or which are not likely to adversely affect the watershed on an individual or cumulative basis. Therefore, this proposed regional condition would not be practicable in light of the District's workload and would not likely result in substantial environmental benefits to the aquatic ecosystem.

(5) Gaviota Creek, Mission Creek and Carpinteria Creek in Santa Barbara County for bank stabilization projects and grade control structures.

Reason for Exclusion: In Gaviota Creek, Mission Creek and Carpinteria Creek, bank stabilization and grade control structure projects have resulted in more than minimal cumulative impacts to flow velocity and water surface elevations during storm events. With the augmented flow velocity, channel substrate can be scoured during large storm events causing loss of vegetation and long-term channel incision. Grade control structures effectively preclude access of reaches upstream of the structures to aquatic organisms dependent upon such access for successful reproduction. Although the bank stabilization and grade control structure projects have not resulted in large losses of waters of the U.S., the cumulative hydrogeomorphic effects of these projects have reduced the amount of

habitat for the threatened southern steelhead and other species that utilize these streams. At present, there has been a cumulative adverse impact directly resulting from the use of NWP 13, 14 and 26 in these stream channels. By taking discretionary authority over new bank stabilization and grade control structure projects in these three stream channels, the Los Angeles District will ensure future impacts are appropriately mitigated.

A proposed regional condition for the NWPs that precludes all bank stabilization and grade control structure projects in the entire Gaviota Creek, Mission Creek and Carpinteria Creek watersheds would unnecessarily increase our workload to require review small-scale projects in areas of the watershed that do not exhibit substantial cumulative impacts from bank stabilization at this time, or which are not likely to adversely affect the watershed on an individual or cumulative basis. Therefore, this proposed regional condition would not be practicable in light of the District's workload and would not likely result in substantial environmental benefits to the aquatic ecosystem.

- (b) The Corps has identified waters of the U.S. that will be subject to additional notification requirements for activities authorized by this NWP. An explanation accompanies each waterbody type. These waters are:

(1) Any special aquatic site in the Los Angeles District as defined at 40 CFR Part 230.40-45.

Reason for Notification Requirement: It is the position of the Los Angeles District that any discharge of dredged or fill material in a special aquatic site warrants the review of Regulatory Branch. The loss of approximately 90 percent of wetland resources in southern California and the general scarcity of special aquatic sites in this semi-arid region indicate the need for compensatory mitigation to ensure minimal adverse impacts to special aquatic sites. With this notification requirement, the Los Angeles District can ensure NWP 7 would have minimal impacts, both individually and cumulatively, to special aquatic sites.

(2) Any jurisdictional waters of the U.S. in the Santa Monica Mountains watersheds (bounded by Calleguas Creek on the west, by Highway 101 on the north and east, and by Sunset Boulevard and the Pacific Ocean on the south).

Reason for Notification Requirement: The jurisdictional waters of the U.S. in the Santa Monica Mountains watersheds support substantial aquatic resources that exhibit relatively high physical and biological functions. Furthermore, a number of endangered species, including the steelhead and tidewater goby, utilize habitats in these watersheds. Past construction activities in and adjacent to waters of the U.S. have degraded portions of these high value systems. To ensure NWP 7 would have minimal impacts in the Santa Monica Mountains watersheds, both individually and cumulatively, each project proposing to discharge dredged or fill material into waters of the U.S. should be reviewed by Regulatory Branch. With this notification requirement, further impacts in this area would be compensated with appropriate mitigation and impacts to the aquatic ecosystem would be minimized.

(3) Any perennial watercourses or waterbodies in the State of Arizona and the Mojave and Sonoran (Colorado) desert regions of California in the Los Angeles District

(generally north and east of the San Gabriel, San Bernardino, San Jacinto and Santa Rosa mountain ranges, and south of Little Lake, Inyo County).

Reason for Notification Requirement: Perennial watercourses or waterbodies in the desert regions of the Los Angeles District support substantial aquatic resources that exhibit relatively high physical and biological functions on a local and regional basis. These watercourses provide important and unique habitat for threatened and endangered species, including least Bell's vireo and southwestern willow flycatcher, Neotropical migratory birds and other indigenous wildlife. In addition, past construction activities in and adjacent to these perennial watercourses have degraded portions of these high value systems. To ensure NWP 7 would have minimal impacts to perennial watercourses and waterbodies in the desert regions of the Los Angeles District, both individually and cumulatively, every project in these habitat types in the District should be reviewed.

(4) All areas designated as Essential Fish Habitat (EFH) by the Pacific Fishery Management Council (i.e., all tidally influenced areas).

Reason for Notification Requirement: Projects that occur in EFH must be reviewed for compliance with the Magnuson-Stevens Fishery Conservation and Management Act. The Corps, as a federal action agency, must make a finding whether the proposed project would affect EFH, and must coordinate with NMFS. The jurisdictional waters of the U.S. in tidal areas support substantial aquatic resources that exhibit relatively high physical and biological functions. Furthermore, a number of endangered species, including California least tern, California brown pelican, western snowy plover, and tidewater goby, utilize habitats in these areas. In addition, past construction activities in and adjacent to waters of the U.S. have degraded portions of these high value coastal systems. To ensure NWP 7 would have minimal impacts to Essential Fish Habitat, both individually and cumulatively, Regulatory Branch should review every project. With this notification requirement, any further losses in these coastal areas would be compensated with mitigation and further impacts to the marine ecosystem would be minimized. With this notification requirement, the Los Angeles District can ensure NWP 7 would have minimal impacts, both individually and cumulatively, to aquatic resources in tidal areas within the Los Angeles District.

5. Alternatives:

- (a) No Regional Conditions: With no Regional Conditions, NWP 7 could have more than minimal impacts in some portions of the Los Angeles District. Without regional conditions requiring notification in the Santa Monica Mountains watersheds, jurisdictional special aquatic sites, essential fish habitat and perennial watercourses in desert areas, there could be more than minimal impacts to waters of the United States that exhibit both high physical and biological functions, as well as contributing to substantial cumulative impacts in some portions of these areas. Without specific requirements for road crossings, there could be more than minimal impacts to steelhead in coastal watersheds from the Santa Monica Mountains in Los Angeles County to the San Luis Obispo County/Monterey County boundary. Without a regional condition requiring notification for projects in jurisdictional special aquatic sites, impacts to these relatively rare resources could

occur without compensatory mitigation, contributing to more than minimal impacts, both individually and cumulatively, to special aquatic sites in the Los Angeles District. In addition, with no regional conditions, NWP 7 would have more than minimal impacts on jurisdictional vernal pools in the Los Angeles District. Historically there has been a 95 to 99 percent loss of vernal pool habitat in the southern California area. Further losses would result in more than minimal impacts both individually and cumulatively. Overall, with no regional conditions, NWP 7 could be utilized in areas with sensitive special aquatic sites with no review by the Corps or the resource agencies. With no regional conditions, some activities proposed for authorization by NWP 7 would have more than minimal impacts to sensitive watersheds and resources, special aquatic sites and jurisdictional vernal pool habitat in the Los Angeles District.

- (b) **Alternative Regional Limits or Notification Thresholds:** An alternative to excluding the use of NWP 7 in special aquatic sites in the State of Arizona and the desert regions of California and in vernal pools would allow a limited amount of impact in to these resources through establishment of higher thresholds or other restrictions. Special aquatic sites in the desert regions of the Los Angeles District support substantial aquatic resources that exhibit relatively high physical and biological functions. These aquatic areas provide important and unique habitat for threatened and endangered species, such as least Bell's vireo and southwestern willow flycatcher, Neotropical migratory birds, and other indigenous wildlife. In addition, past construction activities in and adjacent to these special aquatic sites have degraded portions of these high value systems. This alternative does not ensure the proposed NWPs would have minimal impacts, both individually and cumulatively, to special aquatic sites in the desert regions of the Los Angeles District. To ensure projects authorized under NWP 7 would have minimal impacts, both individually and cumulatively, new permanent fills in special aquatic sites in the above desert regions should be precluded in the Los Angeles District, with the exception of those mentioned in (2) above. By eliminating discharges of dredged and fill material in jurisdictional special aquatic sites in the desert and jurisdictional vernal pools, proposed projects that would impact these valuable resources would be reviewed under the Individual Permit process that requires a rigorous alternatives analysis. As a result, further impacts to the jurisdictional special aquatic sites in the desert and jurisdictional vernal pools would be avoided and minimized to the maximum extent practicable.
- (c) **Alternative Regional Nationwide Permit Conditions:** A proposed alternative regional condition would prohibit the use of NWP 7 in all special aquatic sites in the Los Angeles District. The loss of approximately 90% of wetland resources in southern California and the general scarcity of special aquatic sites in this semi-arid region indicate there could be a need for the review of any project which would discharge dredged or fill material in a jurisdictional special aquatic site under the 404(b)(1) Guidelines and the public interest factors to ensure adverse impacts to jurisdictional special aquatic sites are avoided and minimized. However, a regional condition for NWP 7 that precludes all discharges in all special aquatic sites would unnecessarily increase our workload to review small-scale projects in areas that do not have substantial cumulative impacts or high value aquatic resources. As a result, this alternative is considered impracticable and would result in minimal environmental benefits to the aquatic ecosystem.

In conclusion, the majority of the projects that could be authorized under the proposed NWP 7 would likely have minimal impacts to the aquatic ecosystem. With the proposed modifications to NWP 7, the Los Angeles District would ensure that NWP 7 has minimal impacts

on both sensitive resources and watersheds without a substantial increase in workload.

6. Endangered Species Act:

General Considerations: The large number of endangered species in southern California has made the general public more aware of the need to address this issue for many proposed projects. General Condition 11 requires the applicant to contact the Corps if their proposed project may affect a threatened or endangered species. The Los Angeles District has substantial information, including maps, previous studies and survey data that document areas that support endangered species. The Los Angeles District is also very careful to inform all prospective applicants of the need to comply with the ESA. If the Los Angeles District has no available data for a proposed project, the applicant may be referred to the USFWS or NMFS for additional information. When the District receives an application within the range of a listed species and/or the project area otherwise supports suitable habitat, the USFWS or NMFS is contacted early in the review process. To facilitate compliance with the ESA, the Los Angeles District has coordinated with the USFWS to complete programmatic consultations for several threatened and endangered species in Ventura, Santa Barbara, and San Luis Obispo counties.

To ensure compliance with the ESA, the Los Angeles District has proposed additional notification requirements for special aquatic sites and sensitive resources (Santa Monica Mountains, perennial watercourses and waterbodies in desert regions, and areas designated as Essential Fish Habitat). As a result, areas with a higher likelihood for supporting endangered species or their designated critical habitat would be subject to notification requirements.

The Los Angeles District also proposed a regional condition that would require road crossings to have minimal impacts to stream channels that support southern steelhead. As documented above, the Los Angeles District has allocated a substantial amount of its time and resources to compliance with the ESA.

Standard Local Operating Procedures for Endangered Species: The Los Angeles District has various procedures for ensuring compliance with the ESA. SLOPES formalize procedures between agencies to enable the agencies to better ensure compliance with the ESA. With the implementation of SLOPES, the above procedures would be formally documented, facilitating the compliance of NWP 7 and other NWPs with the ESA. It is anticipated there will be many situations that will not be addressed by SLOPES and a case-by-case determination will be made regarding consultation with the USFWS or NMFS pursuant to Section 7 of the ESA.

7. Supplement to National Impact Analysis:

(a) Public interest review factors (33 CFR 320.4(a)(1)):

In addition to the discussion in the national decision document for this NWP, the Corps District has considered the local impacts expected to result from the regulated discharges authorized by this NWP, including the reasonably foreseeable cumulative effects of those discharges.

(1) Conservation: Upon review by District staff and various resource agencies, it is expected most projects proposed for authorization would be redesigned to ensure the least amount of high value aquatic resources are affected, thus ensuring conservation of the greatest amount of area. Therefore, the effects are expected to be minimal.

(2) Economics: Same as discussed in the national decision document.

(3) Aesthetics: Aesthetics of individual project areas would be temporarily affected during installation and maintenance of the outfall structure and canal due to the presence of heavy equipment, grading activities, and the potential temporary and permanent loss of aquatic habitat and riparian vegetation. However, after District review and consultation with resource agencies, projects would likely be modified or require compensatory mitigation to ensure impacts are minimal. Because outfall structures are relatively small, few are constructed in a specific geographic area, and impacts would likely be compensated, cumulative impacts are considered minimal.

(4) General environmental concerns: In the Los Angeles District, numerous threatened or endangered species require extensive coordination with USFWS and NMFS. The semi-arid environment limits the extent of aquatic resources in the southern California/ Arizona area. Regional conditions for NWP 7 would preclude discharges of dredged or fill material in jurisdictional vernal pools in specific regions, special aquatic sites and perennial watercourses and waterbodies in Arizona and the desert regions of California, and in the Murrieta Creek and Temecula Creek watersheds for certain types of activities. With the inclusion of the notification requirements for NWP 7 in special aquatic sites and sensitive watersheds and other aquatic resources, adverse effects on general environmental concerns in the Los Angeles District would be further reduced. With the continuation of the existing informal coordination procedures and with the inclusion of the proposed notification requirements, NWP 7 would have minimal impacts on general environmental concerns in the Los Angeles District.

(5) Wetlands: Construction of outfall structures and related intake structures may result in impacts to wetland and riparian vegetation. Some vegetation may have to be removed prior to construction while other vegetation may be crushed due to various construction activities, or covered by the placement of fill material. Wetland and riparian vegetation provides shelter, shade, breeding, and rearing areas for various fish and other aquatic organisms as well as terrestrial wildlife. It is anticipated most areas of disturbance would be small, and the adverse effects would be minimal with the incorporation of compensatory mitigation as appropriate. However, wetlands in Arizona and the desert regions of California are sufficiently rare that the loss of any wetland not associated with a flood control facility or mitigation site should require site-specific review under the Section 404(b)(1) Guidelines and public interest review factors to fairly evaluate the impacts of the proposed activity on aquatic functions and values on the local and regional level. With the inclusion of a regional condition excluding the use of NWP 7 in jurisdictional special aquatic sites and vernal pool areas, and other sensitive resource areas, cumulative adverse effects would be considered minimal.

(6) Historic properties: Same as discussed in the national decision document.

(7) Fish and wildlife values: Same as discussed in the national decision document.

- (8) Flood hazards: Same as discussed in the national decision document.
- (9) Floodplain values: Same as discussed in the national decision document.
- (10) Land uses: Same as discussed in the national decision document.
- (11) Navigation: Same as discussed in the national decision document.
- (12) Shore erosion and accretion: Same as discussed in the national decision document.
- (13) Recreation: Same as discussed in the national decision document.
- (14) Water supply and conservation: Same as discussed in the national decision document.
- (15) Water quality: Same as discussed in the national decision document.
- (16) Energy needs: Same as discussed in the national decision document.
- (17) Safety: Same as discussed in the national decision document.
- (18) Food and fiber production: Same as discussed in the national decision document.
- (19) Mineral needs: Same as discussed in the national decision document.
- (20) Considerations of property ownership: Same as discussed in the national decision document.
- (b) 404(b)(1) Guidelines Impact Analysis (Subparts C-F):
 - (1) Substrate: With NWP 7, there would be minor impacts to channel substrate in the immediate vicinity of the construction area for outfall structure. Subsequent maintenance activities in close proximity to existing outfall structures would result in minimal changes to disturbed channel reaches. To ensure minimal impacts in special aquatic sites and sensitive watershed areas and sensitive resources, waters excluded from NWP 7 or additional notification requirements would be required for NWP 7 (see above). With the inclusion of these regional conditions, NWP 7 would result in minimal impacts to channel substrate.
 - (2) Suspended particulates/turbidity: Same as discussed in the national decision document.
 - (3) Water: Same as discussed in the national decision document.
 - (4) Current patterns and water circulation: Same as discussed in the national decision document.
 - (5) Normal water level fluctuations: Same as discussed in the national decision document.

(6) Salinity gradients: The requirements of the National Pollutant Discharge Elimination System would ensure effluent from the outfall structure does not substantially change salinity gradients within the water column. With compliance with applicable water quality regulations, the impacts would be minimal.

(7) Threatened and endangered species: Effects from the construction and maintenance of outfall structures are likely to involve minor losses, alteration, and reduction of aquatic habitat; loss and alteration of the aquatic invertebrate assemblage; loss of riparian vegetation; sedimentation; and turbidity. Take is possible in the form of capture, trap, harm, harassment, injury, and mortality of federally listed species. Conditions developed during the notification process and consultation with the USFWS and NMFS will ensure minimal impacts.

(8) Fish, crustaceans, mollusks, and other aquatic organisms in the food web: Same as the national decision document.

(9) Other wildlife: Same as the national decision document.

(10) Special aquatic sites: The potential impacts to specific special aquatic sites are discussed below:

(a) Sanctuaries and refuges: Same as the national decision document.

(b) Wetlands: See discussion above.

(c) Mud flats: Same as the national decision document.

(d) Vegetated shallows: Same as the national decision document.

(e) Coral reefs: Same as the national decision document.

(f) Riffle-and-pool complexes: Effects from the construction and maintenance of outfall structures are likely to involve loss, alteration, and reduction of riffle-and-pool complexes, and affect the substrate condition and composition through sedimentation. Upon review by District staff and other resource agencies, it is expected projects would be redesigned or require compensatory mitigation to ensure impacts to high value complexes are minimized. Therefore, the effects of NWP 7 are expected to be minimal, both individually and cumulatively, to riffle and pool complexes in the Los Angeles District.

(11) Municipal and private water supplies: Same as the national decision document.

(12) Recreational and commercial fisheries: Same as the national decision document.

(13) Water-related recreation: Same as national decision document.

(14) Aesthetics: See aesthetics discussion above.

(15) Parks, national and historical monuments, national seashores, wilderness areas, research sites, and similar areas: Same as the national decision document.

8. List of Final Corps Regional Modifications and Conditions for NWP 7:

The original public notices issued by Los Angeles District to receive comments on proposed regional conditions included two with subparagraphs for notification requirements and for discretionary authority specific to particular aquatic types or watershed areas. For the sake of ease of use, these conditions' order are further modified below to reflect a simple listing, as well as grouping several that were particularly similar.]

a. For coastal watersheds from the southern reach of the Santa Monica Mountains in Los Angeles County to the San Luis Obispo County/Monterey County boundary, all road crossings must employ a bridge crossing design that ensures passage and/or spawning of steelhead (*Oncorhynchus mykiss*) is not hindered in any way. In these areas, bridge designs that span the stream or river, including designs for pier- or pile-supported spans, or designs based on use of a bottomless arch culvert simulating the natural stream bed (i.e., substrate and streamflow conditions in the culvert are similar to undisturbed stream bed channel conditions) shall be employed unless it can be demonstrated the stream or river does not support resources conducive to the recovery of federally listed anadromous salmonids, including migration of adults and smolts, or rearing and spawning. This proposal also excludes approach embankments into the channel unless they are determined to have no detectable effect on steelhead.

b. For the State of Arizona and the Mojave and Sonoran (Colorado) desert regions of California in Los Angeles District (generally north and east of the San Gabriel, San Bernardino, San Jacinto, and Santa Rosa mountain ranges, and south of Little Lake, Inyo County), no nationwide permit, except Nationwide Permits 1 (Aids to Navigation), 2 (Structures in Artificial Canals), 3 (Maintenance), 4 (Fish and Wildlife Harvesting, Enhancement, and Attraction Devices and Activities), 5 (Scientific Measurement Devices), 6 (Survey Activities), 9 (Structures in Fleeting and Anchorage Areas), 10 (Mooring Buoys), 11 (Temporary Recreational Structures), 20 (Oil Spill Cleanup), 22 (Removal of Vessels), 27 (Stream and Wetland Restoration Activities), 30 (Moist Soil Management for Wildlife), 31 (Maintenance of Existing Flood Control Projects), 32 (Completed Enforcement Actions), 35 (Maintenance Dredging of Existing Basins), 37 (Emergency Watershed Protection and Rehabilitation), and 38 (Cleanup of Hazardous and Toxic Waste), or other nationwide or regional general permits that specifically authorize maintenance of previously authorized structures or fill, can be used to authorize the discharge of dredged or fill material into a jurisdictional special aquatic site as defined at 40 CFR Part 230.40-45 (sanctuaries and refuges, wetlands, mudflats, vegetated shallows, coral reefs, and riffle-and-pool complexes).

c. For all projects proposed for authorization by nationwide or regional general permits where prior notification to the District Engineer is required, applicants must provide color photographs or

color photocopies of the project area taken from representative points documented on a site map. Pre-project photographs and the site map would be provided with the permit application. Photographs should represent conditions typical or indicative of the resources before impacts.

d. Notification pursuant to general condition 13 shall be required for projects in all special aquatic sites as defined at 40 CFR Part 230.40-45 (sanctuaries and refuges, wetlands, mudflats, vegetated shallows, coral reefs, and riffle-and-pool complexes), and in all perennial watercourses or waterbodies in the State of Arizona and the Mojave and Sonoran (Colorado) desert regions of California in Los Angeles District (generally north and east of the San Gabriel, San Bernardino, San Jacinto, and Santa Rosa mountain ranges, and south of Little Lake, Inyo County).

e. Notification pursuant to general condition 13 shall be required for projects in all areas designated as Essential Fish Habitat by the Pacific Fishery Management Council (i.e., all tidally influenced areas).

f. Notification pursuant to general condition 13 shall be required for projects in all watersheds in the Santa Monica Mountains in Los Angeles and Ventura counties bounded by Calleguas Creek on the west, by Highway 101 on the north and east, and by Sunset Boulevard and Pacific Ocean on the south.

g. Individual permits shall be required in all jurisdictional vernal pools.

h. Individual permits shall be required in Murrieta Creek and Temecula Creek watersheds in Riverside County for new permanent fills in perennial and intermittent watercourses otherwise authorized under NWP 39, 42 and 43, and in ephemeral watercourses for these NWPs for projects that impact greater than 0.1 acre.

i. Individual permits shall be required in San Luis Obispo Creek and Santa Rosa Creek in San Luis Obispo County for bank stabilization projects, and in Gaviota Creek, Mission Creek and Carpinteria Creek in Santa Barbara County for bank stabilization projects and grade control structures.

9. NWP 7 was issued without a 401 Water Quality Certification or a Coastal Zone Management Act Consistency Determination. Therefore, each NWP 7 application would require review and approval from both the Regional Water Quality Control Board and the California Coastal Commission, if in the Coastal Zone, before the Corps could authorize any discharges of dredged or fill material in waters of the United States or work or structures in navigable waters.

10. Cumulative Impacts:

The Los Angeles District has verified approximately 130 authorizations under NWP 7, with an average of approximately 14 projects annually. Temporary impacts generally result from construction-related activities, such as cut and fill, stockpiling of fill material, and staging and storage areas for equipment and materials. Permanent impacts typically encompass the footprint of the outfall and intake structures and any associated grade stabilizers, such as rock rip-rap or wing deflectors. Individually and cumulatively, permanent impacts resulting from construction of outfall

structures are minimal and typically impact far less than two acres of waters of the United States per year in total. Temporary impacts are slightly greater, but the effects are typically short-term and minor.

The Los Angeles District anticipates that many projects that were previously constructed under NWP 26 and were non-notifying may now seek NWP 7 to authorize installation and maintenance of an outfall structure. Review of projects previously authorized under NWP 26 indicates that approximately five additional projects per year could be authorized under the proposed NWP 7. In general, these projects occurred in small ephemeral and intermittent drainages or in tidally influenced areas. In addition, these projects typically affected less than one acre of waters of the United States with limited permanent impacts to the aquatic ecosystem. Overall, the review of the existing data indicates the proposed NWP 7 would continue to impact only a small amount of waters of the United States with most authorized work resulting in minor temporary impacts to the aquatic ecosystem. Due to the small area of impact associated with most projects authorized under NWP 7 and the short-term minor impacts usually associated with the construction of outfall structures, NWP 7 has resulted in minor impacts, both individually and cumulatively, to aquatic resources in the Los Angeles District.

The terms and conditions of NWP 7, including preconstruction notification requirements and the regional conditions listed in Section 8 (above), will insure that NWP 7 only authorizes activities with minimal impacts, both individually and cumulatively, on the aquatic environment. High value waters will be protected by the restrictions in the above regional conditions and the preconstruction notifications for the NWP. Through the preconstruction notification process, the Los Angeles district will review certain activities on a case-by-case basis to ensure those activities result in minimal adverse effects on the aquatic environment, both individually and cumulatively. During the preconstruction notification process, the District Engineer may also exercise discretionary authority and require an individual permit for those activities that may result in more than minimal individual or cumulative adverse effects on the aquatic environment.

If at a later time, there is clear unequivocal evidence that NWP 7 would result in more than minimal adverse effects on the aquatic environment, individually or cumulatively, the modification, suspension or revocation procedures at 33 CFR 330.4(e) or 33 CFR 330.5 will be used.

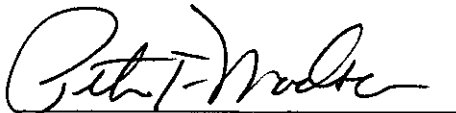
11. Settlement Agreement: On October 8, 1999, a court order (as clarified on November 10, 1999) was entered by the United States District Court (Court) for the District of Arizona that enjoined the Corps of Engineers (Corps) from authorizing projects under nationwide permits ("NWPs") 13, 14, or 26 within the range of the endangered cactus ferruginous pygmy-owl (*Glaucidium brasilianum cactorum*) until a Court ordered "regionally based, programmatic impact analysis" has been completed. On March 9, 2000, at the national level, the Corps announced that as replacement permits ("Replacement Permits") it was modifying six NWPs (NWPs 3, 7, 12, 14, 27, and 40) and issuing five new NWPs (NWPs 39, 41, 42, 43, and 44) to replace NWP 26. To resolve the legal question of whether or not the October 8, 1999 court order applies to the Replacement Permits the Court approved a settlement agreement ("Settlement Agreement") executed on September 22, 2000 by Center for Biological Diversity and Defenders of Wildlife (Plaintiffs) and the Corps (Defendants).

In the Settlement Agreement, the Corps agreed to satisfy certain conditions prior to making the Replacement Permits effective within the geographic area subject to the injunction in Defenders of Wildlife v. Ballard, No. CV-97-794-TUC-ACM (D. Ariz.). One condition was that

the Corps agreed to solicit comments on the environmental documentation for the replacement permits and regional conditions for 45 days and delay for an additional 45 days making the replacement permits effective within the geographic area of the injunction. The Corps will give full and due consideration to these comments and will modify the replacement permits or regional conditions as necessary to ensure compliance with all federal laws. Therefore, within the geographic scope of the injunction, which includes portions of Pima and Pinal Counties in Arizona, the Corps will not use the Replacement Permits and will not require compliance with the new regional conditions for the all other non-Replacement Permits NWP until this condition is satisfied. When the necessary conditions of the Settlement Agreement have been satisfied, the Corps will announce an effective date for the Replacement Permits and the regional conditions within the geographic area covered by the Settlement Agreement.

12. Final Determination:

Based on the considerations discussed above, and in accordance with 33 CFR 330.4(e)(1) and 330.5(c), I have determined that this NWP, including its terms and conditions, all regional conditions, and limitations, will authorize only those activities with minimal adverse effects on the aquatic environment, individually or cumulatively.



PETER T. MADSEN
BG, DIVISION ENGINEER
SOUTH PACIFIC DIVISION

22 May 91
DATE